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No.

IN THE

Supreme Court of The United States

OCTOBER TERM, 1988

WORLD COLOR PRESS, INC., *Petitioner,*

v.

ANN McLAUGHLIN, Secretary of Labor, and GRAPHIC COMMUNICATIONS INTERNATIONAL UNION, LOCAL 554, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September 21, 1988

QUESTIONS PRESENTED

1. Whether an employer in an enforcement proceeding under the OSH Act can be required to disclose its trade secrets to non-governmental consultants contracted by the Secretary, who are not subject to the criminal sanctions of the Trade Secrets Act, when any protective order to be issued by the OSHRC is not enforceable after conclusion of the proceeding, or enforceable by contempt sanctions during the proceeding.

2. Whether the 12-year evolution of the Occupational Safety and Health Review Commission's policy regarding the protection to be provided for an employer's trade secrets can be considered arbitrary and capricious.

3. Whether the Commission abused its discretion in ruling that protection of an employer's trade secrets requires the Secretary of Labor to obtain an inspection warrant or other order from a federal district court, prior to entry by private consultants into the employer's workplace.

[Note: Petitioner reserves the right to argue Question 4 in the event certiorari is granted on the above questions, but does not include Question 4 among the reasons for the grant of certiorari].

4. Whether the doctrine of collateral estoppel precludes the Secretary from relitigating the question whether he may use non-governmental consultants to inspect World Color's workplace when to do so would jeopardize the Company's trade secrets, since that question has already been fully litigated by these parties and decided in World Color's favor.

LIST OF PARTIES and RULE 28.1 LIST

The parties to the proceedings below were the petitioner World Color Press, Inc. and the respondents Ann McLaughlin, Secretary of Labor, and Graphic Communications International Union, Local 554. These same parties are before this Court. The Occupational Safety and Health Review Commission was a named respondent below, but did not appear.

The parent company of petitioner World Color Press, Inc. is Printing Holdings, L.P. Petitioner has no subsidiaries or affiliates to list pursuant to Rule 28.1.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner World Color Press, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled proceeding on April 15, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 843 F.2d 1490, and is reprinted in the appendix hereto, p. A1, *infra.* The Court of Appeals' denial of petitioner's motion for rehearing is included in the appendix at p. A26-A27.

The memorandum decision of the Occupational Safety and Health Review Commission is reported at 12 O.S.H. Cas. (BNA) 1243, [1986-87] O.S.H.Dec. (CCH) ¶ 27,697. It is reprinted in the appendix hereto, p. A12, *infra.*

JURISDICTION

Invoking federal jurisdiction under 29 U.S.C. § 660(a) and (b), the respondents petitioned the Court of Appeals for the District of Columbia Circuit for review of a decision of the Occupational Safety and Health Review Commission. On April 15, 1988, the District of Columbia Circuit reversed the Commission decision regarding the necessary precautions to safeguard employers' trade secrets as arbitrary and capricious, vacated the Commission's involuntary dismissal of the OSH Act enforcement proceeding and reinstated the case. See p. A11-A12, *infra*. The petitioner's petition for rehearing *en banc* was denied on June 23, 1988. See p. A26-A27, *infra*.

The jurisdiction of this Court to review the judgment of the District of Columbia Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

18 U.S.C. § 1905. Trade Secrets Act—Disclosure of confidential information generally.

> Whoever, being an officer or employee of the United States or of any department or agency thereof, or agent of the Department of Justice as defined in the Antitrust Civil Process Act (15 U.S.C. 1311-1314), publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person,

firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

29 U.S.C. § 664. OSH Act—Disclosure of trade secrets; protective orders.

All information reported to or otherwise obtained by the Secretary or his representative in connection with any inspection or proceeding under this chapter which contains or which might reveal a trade secret referred to in section 1905 of Title 18 shall be considered confidential for the purpose of that section, except that such information may be disclosed to other officers or employees concerned with carrying out this chapter or when relevant in any proceeding under this chapter. In any such proceeding the Secretary, the Commission, or the court shall issue such orders as may be appropriate to protect the confidentiality of trade secrets.

STATEMENT OF THE CASE

A. Background Facts.

In 1976, the Secretary of Labor (the "Secretary") sought to use a non-federal consultant to inspect the bindery department of the plant operated by petitioner's Crossroads Press division, in connection with an OSHA citation alleging violation of the noise standard. Petitioner World Color Press, Inc. ("World Color" or "the company") agreed to an inspection by OSHA employees or others employed by the federal government, but objected to entry by a private consultant because of the need to protect its trade secrets.

The Administrative Law Judge ("ALJ") held an evidentiary hearing at which World Color established the existence of numerous technological innovations in its bindery department. These innovations, or trade secrets, have been developed by World Color through expensive research and development efforts, and make its operations unique. In *World Color Press, Inc.*, OSHRC Docket No. 76-2005 (July 6, 1977), the ALJ agreed that World Color's trade secrets must be adequately protected against disclosure to its competitors. Applying the rule established by the Occupational Safety and Health Review Commission ("the Commission") in *Reynolds Metals Co.*, 3 O.S.H. Cas. (BNA) 749, [1975-76] O.S.H. Dec. (CCH) ¶ 20,214, the ALJ held that to protect World Color's trade secrets, absent a showing of good cause for the use of a private consultant, the Secretary may only use federal employees to inspect World Color's workplace. The Commission affirmed the ALJ decision in *World Color Press, Inc.*, 6 O.S.H. Cas. (BNA) 1084, [1977-1978] O.S.H. Dec. (CCH) ¶ 22,358. The Secretary appealed this decision to the Seventh Circuit Court of Appeals, but later dismissed the appeal. This proceeding will be referred to herein as *World Color I*.

In 1983, the Secretary again sought to use a non-federal consultant to inspect the bindery department of the plant operated by World Color's Salem Gravure division, in connection with enforcement of an OSHA citation alleging violation of the general duty clause of the Occupational Safety and Health Act, 29 U.S.C. § 651, *et seq.* ("the OSH Act"). As before, in this proceeding (which will be referred to as *World Color II*) World Color did not object to the entry of federal employees. However, the company again opposed entry of "independent or private consultants, other than full-time governmental employees," because entry posed a threat to World Color's valuable trade secrets (J.A. 21).[1]

The Secretary requested an order from the ALJ requiring World Color to allow the inspection by the Secretary's non-federal consultant. World Color moved for entry of a protective order limiting inspections to governmental employees, who would be subject to severe sanctions for improper disclosure of trade secrets under the federal Trade Secrets Act, 18 U.S.C. § 1905.

After holding an evidentiary hearing, the ALJ again found that World Color had shown the existence of valuable trade secrets in its bindery department. Some of these trade secrets were identical to those which had been the subject of the prior proceeding. World Color introduced extensive uncontradicted evidence that its bindery departments at both the Crossroads Press and Salem Gravure plants contain numerous technological innovations, which have been devel-

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[1]References to the record are indicated either by "J.A." followed by a page number, for portions of the record which were reproduced in the Joint Appendix filed with the Court of Appeals, or by "R." followed by an item number, referring to record items listed in the Commission's index to the record (J.A. 1-7).

oped by the Company's own research and development efforts (J.A. 43-44).

World Color is in the highly competitive printing business (J.A. 30). The Salem Gravure plant was built in 1976, and contains some of the newest and most unique bindery facilities in the country, with one of the most efficient production capacities of any in the world (*Id.* at 28). The replacement cost of the bindery's equipment alone is in excess of $24 million (*Id.*).

World Color introduced evidence that it relies heavily upon plant security and the laws prohibiting disclosure of trade secrets for the continued protection of its innovations (J.A. 28-30). World Color's valuable trade secrets have been developed at great effort and cost, and make its operations unique in the printing industry (*Id.*). If its competitors were to gain knowledge of these trade secrets, World Color would be put at a distinct business disadvantage (J.A. 30).

During the hearings, the Secretary did not introduce any evidence to show good cause for the need to use a non-federal consultant to inspect World Color's bindery (R. item 34). Agencies of the federal government in fact employ hundreds of qualified experts who would be available for use by the Secretary (including eight experts employed by OSHA and the National Institute for Occupational Safety and Health ("NIOSH")).

The Secretary also failed to show that the case would in any way be delayed should she be required to use a federal employee, or required to obtain a federal court inspection warrant or order authorizing an inspection by a private consultant (R. item 34). Instead, the Secretary's counsel simply argued that a private consultant was needed to conduct the inspection; counsel further indicated to the ALJ

that the Secretary would refuse to seek a federal court warrant or order, and would continue to ask the Commission to enter an administrative protective order to permit the inspection by the consultant (*Id.*).

After hearings in *World Color II* and *World Color I*, both ALJs ruled that the company had proven the existence of valuable trade secrets in its bindery department, and the need to protect those trade secrets from disclosure to World Color's competitors (J.A. 42-44; R. item 34). World Color opposed entry by private consultants, as opposed to federal employees, because of the inadequate protections against disclosure of the company's trade secrets (either intentional or inadvertent) by a consultant who makes his living advising other companies, including competitors of World Color (*Id.*). The ALJ in *World Color II* nevertheless ordered the employer to permit an inspection by the Secretary's non-federal consultant, subject to the terms of an administrative protective order (*Id.*).

The Commission had changed its rule in 1978 with respect to the protections needed to safeguard trade secrets when the Secretary seeks to use a private consultant for inspections. Overruling *Reynolds Metals*, the Commission in *Owens-Illinois, Inc.*, 6 O.S.H. Cas. (BNA) 2162, [1978] O.S.H. Dec. (CCH) ¶ 23,218, eliminated the need for the Secretary to show good cause for the need to use a private consultant, so long as an administrative protective order is entered. An *Owens-Illinois* protective order must contain:

1. An opportunity for the employer to review the consultant's resume and to challenge the selection of the particular expert on the grounds that he is aligned with competitors;

2. Execution by the expert of a written non-disclosure oath;

3. The contract between the Secretary and expert must contain a non-disclosure agreement which is enforceable by the employer as a third-party beneficiary; and

4. The protective order must provide that sanctions may be imposed against anyone working on behalf of the Secretary who violates its provisions.

In addition to requiring an *Owens-Illinois* protective order, the ALJ restricted entry of the Secretary's expert to World Color's bindery department and ordered that the expert's notes and photographs be returned to the Secretary at the conclusion of the case.

B. Decisions Below.

On interlocutory appeal, the Commission reversed the ALJ decision on the grounds that an administrative protective order provides insufficient protection for the confidentiality of World Color's trade secrets (*Infra* at p. A8.). *Salem Gravure Division of World Color Press, Inc.*, 12 O.S.H. Cas. (BNA) 2143, [1986-87] O.S.H. Dec. (CCH) ¶ 27,697, hereinafter referred to as *World Color II*.

The Commission agreed with World Color's position that its valuable trade secrets can be protected only if the Secretary uses full-time federal employees who are subject to the criminal sanctions of the Trade Secrets Act, 18 U.S.C. § 1905 (*Infra* at pp. A23-A25). Reversing the ALJ's decision, the Commission ruled that, when an employer's trade secrets are shown, the Secretary may use a non-federal expert to inspect the premises only after he has obtained a federal district court inspection warrant or other appropriate order making the non-federal expert subject to the court's contempt powers (*Infra* at p. A24-A25). Under the deci-

sion, the Secretary is still free to use a federal expert for inspections, without the need for a warrant or judicial order.

The Commission determined that the administrative protective order suggested by the ALJ was inadequate to protect employers' trade secrets from improper disclosure by private consultants because the Commission lacks authority to impose sufficient sanctions against a non-federal expert who violates a Commission protective order (*Infra* at p. A21-A22). According to the Commission, "we cannot fairly impose sanctions against an employer for his unwillingness to risk the irreparable loss of his trade secrets when that risk of loss is due to the unenforceability of our own protective orders against third party consultants" (*Id.*).

The only sanction the Commission can impose upon an outside expert for the improper disclosure of trade secrets is to debar him from appearing in other Commission proceedings (*Infra* at pp. A20-A21). The Commission acknowledged that this is an insufficient deterrent (*Id.*). Private consultants are not subject to punishment by fine or imprisonment under the Trade Secrets Act or the contempt powers of a federal court (*Id.*). Moreover, the Commission found that confidentiality agreements, such as proposed by the Secretary in this case, do not provide sufficient protection against disclosure of trade secrets by outside experts (*Id.*).

Striking a balance between the employer's need for the protection of its trade secrets and the Secretary's need for expert inspections, the Commission ruled that the Secretary may either: (1) use a federal expert, or (2) use a private consultant after obtaining "an inspection warrant or other appropriate order in a federal district court that authorizes the inspection he desires and contains non-disclosure provisions that would bring the non-federal expert under the Court's contempt authority" (*Infra* at pp. A23).

The Commission stayed the OSHRC proceedings to allow the Secretary to apply to a federal district court for a warrant or other order authorizing the inspection by a non-federal expert (*Infra* at p. A24-A25). The Secretary declined to use federal employees or to seek an inspection warrant or federal court order allowing use of an outside consultant. Based on the Secretary's failure to prosecute, the case was dismissed pursuant to Fed.R.Civ.P. 41(b).

The respondents appealed the Commission decision to the Court of Appeals for the District of Columbia Circuit. In a decision dated April 15, 1988, the Court of Appeals reversed the Commission, holding that a requirement of a warrant or court order prior to inspection of an employer by the Secretary's private consultant was arbitrary and capricious. *Graphic Communications International Union, Local 554* v. *World Color Press, Inc.*, 843 F.2d 1490 (D.C. Cir. 1988) (*Infra*, p. A11-A12). The Court ruled that the Commission's decision was a departure from established precedent without a reasoned explanation (*Id.*).

The Court stated that the Commission had inadequately explained its ruling that Commission protective orders, third-party beneficiary clauses and the threat of debarment are inadequate to safeguard employers' trade secrets from improper disclosure by consultants hired by the Secretary (*Id.*). The Court reasoned that without further explanation of the need for additional safeguards, the Commission could not require the Secretary to obtain a federal court warrant or order prior to entry by private consultants (*Id.*).

In its ruling, the Court implicitly agreed with the Commission that administrative protective orders alone do not adequately safeguard against disclosures of trade secrets, since they are unenforceable once a final order is entered in the underlying proceeding (*Id.*, n.4.). The Court concluded

that third-party beneficiary provisions offer sufficient protections, despite the fact that they cannot be enforced by the Commission (*Id.*). The Court remanded the case to the Commission for further consideration of the Secretary's motion for enforcement of discovery.

C. The Commission Properly Promulgated Rules Implementing Its Increased Protection of Employer Trade Secrets Pursuant to Notice and Comment Rule-Making Procedures.

In mid-1986, the Commission enacted revised procedural rules to require additional protections of employer trade secrets where the Secretary seeks entry of a private consultant to conduct inspections of employer facilities with confidential trade secrets. The Commission's new rule codified its decision in the *World Color II* case. In summary, once an employer demonstrates the existence of trade secrets in its workplace, the Secretary must obtain a federal court inspection warrant or other order prior to entry of a private consultant for inspections. 29 C.F.R. § 2200.11(f) (1986).

The Commission's rule was promulgated under Administrative Procedure Act requirements for informed rulemaking. 5 U.S.C. § 553. The Commission's proposed rule was published in the Federal Register on June 25, 1986 at 51 Fed.Reg. 23184-23185. The Commission, with the assistance of a Rules Committee, solicited public comment regarding its proposed rule. Extensive comments were received from the ALJs, and 21 organizations and individuals from a wide spectrum of industry, legal and governmental groups. The most extensive comments were filed by the Secretary's office. Following four days of sessions which were open to the public pursuant to the Sunshine Act, 5 U.S.C. § 552(b), the revised rule was adopted and published at 51 Fed.Reg. 32002, *et seq.* (Sept. 8, 1986), to take

effect on December 8, 1986. Neither the Secretary nor any other individual or group appealed the adoption of the Commission's revised rules.

D. Jurisdiction in the Court of Appeals.

The jurisdiction of the Court of Appeals was invoked under provisions of the Occupational Safety and Health Act, 29 U.S.C. § 660(a) and (b), authorizing review by the Court of Appeals of any final order by the Commission.

REASONS FOR GRANTING THE WRIT

I. The question whether the confidentiality of employers' trade secrets can be adequately safeguarded without a requirement that the Secretary obtain an inspection warrant or other federal district court order prior to entry by non-governmental consultants into an employer's workplace raises important and unresolved issues.

Billions of dollars worth of American ingenuity have been jeopardized by the Court of Appeals' decision in this case. Companies can now be ordered to open their doors to inspections by private consultants, who make their livelihoods advising industry competitors, without meaningful safeguards against improper disclosure of valuable trade secrets. The Court's decision will affect the manner in which hundreds of OSHA inspections are conducted where the Secretary chooses to use a private consultant.

The Commission's decision properly balanced employers' interest in the protection of confidential trade secrets and the Secretary's desire to use a private consultant rather than a federal employee expert. Reversal of the Commission's decision may cause irreparable harm to hundreds of employers from the loss of technological advantages

achieved through costly research and development efforts. The importance of this risk to America's corporations in today's highly competitive global economy cannot be overstated.

A. The National Impact of the Court of Appeals' Decision May Be Devastating.

Research and development is the lifeblood of successful corporations; America's emergence in this century as the world's economic leader can be traced in large part to business' dogged adherence to this principle. American corporations such as World Color spend billions of dollars in R&D efforts each year to develop technological innovations which hopefully can be integrated into their manufacturing processes to lead to better and less costly products.

Companies sensitive to the need to protect their trade secrets now carefully screen employees, require employees to sign confidentiality agreements, restrict entrance into facilities and often install high-tech electronic surveillance systems. Unfortunately, on the other side of the fence many companies will go to great lengths to steal their competitors' trade secrets, sometimes even using illegal tactics such as bribery, espionage and blatant theft to do so.

Congress has long recognized the importance of protecting corporate America's trade secrets. Congress enacted the Trade Secrets Act, 18 U.S.C. §1905, which imposes on federal employees unique and serious consequences to deter their disclosure of the highly sensitive information which companies are routinely required to divulge to the government. Penalties for improper disclosures include a criminal fine or imprisonment as well as mandatory removal from office. In OSHA inspections or other proceedings under the OSH Act, the Secretary and her representatives are subject to sanctions under the Trade Secrets Act should a com-

pany's trade secrets improperly be released, since the OSH Act specifically incorporates the Trade Secrets Act. See, 29 U.S.C. § 665 (*supra*, pp. 2-3).

The District of Columbia Circuit has set a dangerous precedent which potentially requires American corporations to expose their valuable trade secrets to the world. Companies such as World Color risk a taking of their valuable property without procedural due process of law, which violates the Constitutional protections of the Fifth Amendment prohibiting governmental actions which would deprive "any person of life, liberty or property without due process of law." Rather than accept the Commission's balancing of the relevant interests of employers in the confidentiality of their trade secrets and the Secretary's ability to use private consultants, the Court of Appeals effectively requires disclosures to the private consultants without any meaningful protection.

B. The Commission's Decision Properly Balanced the Parties' Respective Interests.

The facts are not in dispute. World Color now twice has established the existence of valuable trade secrets which need protection. The Commission reached a policy decision regarding the safeguards needed to protect the confidentiality of trade secrets where the Secretary seeks inspections by private consultants. The Commission's policy concerns an issue particularly within its sphere of expertise, and was reached only after its review of 12 years of experience on trade secret protection and input by World Color and the Secretary in this proceeding as well as numerous industry groups, private attorneys, ALJs, governmental officials and the Secretary in the Commission's 1986 review of its proposed rule on this subject.

After a thorough review of input from all of these sources, the Commission established a procedure which properly balanced the employer's interest in the confidentiality of its trade secrets and the Secretary's desire to use a private consultant rather than a federal employee expert. The Commission determined that the minimal inconvenience to the Secretary of obtaining an inspection warrant or court order where he chooses to use a private consultant is outweighed by the irreparable harm that employers would suffer should their trade secrets be disclosed to competitors. In light of the Commission's inability to impose meaningful sanctions against private consultants for the improper disclosure of trade secrets, this balancing of competing interests was a proper exercise of its discretion, and was not arbitrary and capricious as ruled by the Court of Appeals.

Congress has directed that employer trade secrets revealed to the government during OSH Act investigations must be confidential. Section 15 of the OSH Act, 29 U.S.C. § 664, specifically incorporates the Trade Secrets Act and sanctions thereunder for the improper disclosures of trade secrets. These provisions unfortunately offer no protection once trade secrets are revealed to private consultants hired to assist the government (except outside experts hired by the Department of Justice as part of an antitrust investigation). Recognizing the Justice Department's need for private consultants to prosecute complex antitrust cases and employers' confidentiality rights in their trade secrets, Congress in 1980 amended the Trade Secrets Act to specifically cover private consultants hired by the Justice Department, subjecting them to punishment for improper disclosures of trade secrets. Congress could have, but did not, further extend the Act to cover private consultants retained by other governmental agencies such as OSHA.

Congress chose to impose on federal employees unique and severe penalties for the improper disclosures of employers' trade secrets. The statute provides greater protection for trade secrets than any nondisclosure agreement by a private consultant or between the parties could provide. The parties could not by mere agreement impose on a consultant fines and imprisonment in the event of default. In addition, it is unlikely that the parties could even require his removal from private employment in such event. Nor could the Commission.

Congress clearly was concerned about protecting the extensive confidential information which was to be commonly provided by employers under the OSH Act. To deter unauthorized disclosure, Congress imposed severe criminal penalties for violation (a fine, or imprisonment, or both), as well as mandatory removal from office. 18 U.S.C. § 1905. Congress would not have placed such reliance upon the Trade Secrets Act, the sole protection for trade secrets in the OSH Act, if it intended to allow the Secretary to disclose such trade secrets to non-governmental employees or outside consultants, who are not even covered by 18 U.S.C. § 1905.[2] Congress obviously could have amended the statute to cover private consultants retained by the Secretary, just as it amended the Trade Secrets Act to cover private consultants hired by the Justice Department.

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[2]A private consultant retained by the Secretary is not an employee of the United States for purposes of the Trade Secrets Act, 18 U.S.C. § 1905, and would not be subject to sanctions under the Act for disclosures of a company's trade secrets. In addition, the Secretary cannot contract with an outside consultant to make him a federal employee and thus subject to punishment under the Act (J.A. 59-60).

The application of 18 U.S.C. § 1905 to confidential information received by OSHA was modified only slightly by Congress, allowing disclosure of such information *to other officers or employees of the federal government*, in just two circumstances:

> [S]uch information may be disclosed to other officers or employees *concerned with carrying out this chapter or when relevant in any proceeding under this chapter.*

29 U.S.C. § 664 (1970) (emphasis added). Thus, disclosure may be made to other government officers or employees only if: (1) they are "concerned with carrying out" the OSH Act, or (2) disclosure to them is necessary "when relevant in any proceeding" under the Act. Neither exception applies here.

The two clauses are not redundant nor are they mere surplusage. Instead, they were obviously intended to allow all *OSHA employees* (and, e.g., employees of the Commission and NIOSH) who are concerned with carrying out the OSH Act, to have access to such information regardless of whether they are directly involved in a particular enforcement proceeding; but *non-OSHA employees* of the federal government, whose primary responsibilities do not include carrying out the OSH Act, may have access to such information only when involved in a particular proceeding under the Act. For example, this limited exception might allow employees of the EPA, even though they are not concerned with carrying out the OSH Act, to have access to trade secrets in an employer's plant in order to participate as expert witnesses in a proceeding under the Act.

The Federal Rules of Civil Procedure, incorporated by § 12(g) of the OSH Act, 29 U.S.C. § 661(g), also require protection of employers' trade secrets (See, Rule 26(c)(7)). Even in the absence of 18 U.S.C. § 1905, the

Secretary has the obligation under the Federal Rules of Civil Procedure to establish good cause to employ an outside consultant for the entry sought:

> *It is for the party resisting discovery to establish,* in the first instance, that the information sought is [a trade secret or other confidential research, development or commercial information] and that he might be harmed by its disclosure. Any motion seeking protection on the basis of confidentiality is premature until such time as disclosure of a trade secret is actually requested.
>
> If it is established that confidential information is being sought, *the burden is on the party seeking discovery to establish* that the information is sufficiently relevant and necessary to his case to outweigh the harm disclosure would cause to the person from whom he is seeking the information.

8 C. Wright and A. Miller, *Federal Practice and Procedure*: Civil, § 2043, at pages 300-01 (emphasis added). Further:

> [T]o insure that valuable trade secrets are not unnecessarily exposed and destroyed, the courts will ordinarily *require the party seeking discovery to establish* that the information in question is material and relevant to the matters in issue, or, as it is sometimes more strongly stated, that disclosure is necessary or essential to the proper development of the cause of action or defense, or even that such information is not otherwise available.

Annotation, "Discovery or Inspection of Trade Secret, Formula, or the Like", 17 A.L.R.2d 383 at 385-86 (1951) (emphasis added). See also, *Hartley Pen Co.* v. *United States District Court,* 287 F.2d 324, 331 (9th Cir. 1961).

Congress did not intend the government to serve as a conduit through which the trade secrets of employers would

be funneled in large volume to private consultants who make their living advising competitors. If Congress had intended such a radical departure from long-standing practice under 18 U.S.C. § 1905 (which has been in effect for some 35 years) and the Federal Rules of Civil Procedure, it would have clearly expressed it.

C. The Commission Lacks the Power to Impose Sufficient Sanctions to Deter a Non-federal Expert From Disclosing an Employer's Trade Secrets.

The Commission correctly reasoned that it has no meaningful sanctions to deter non-federal experts from violating its orders and disclosing trade secrets. Although the OSH Act authorizes the Commission to issue protective orders to protect trade secrets, it simply provides no teeth to enforce the protective orders or to punish experts for making improper disclosures. The inadequacy of administrative protective orders is sharply demonstrated by the problem recognized by the Court of Appeals, that the Commission has no power to enforce its own protective orders to prohibit disclosures of confidential information after entry of a final order on the underlying citation (*Infra* p. A11, n.4). A protective order having no effect after the termination of the proceeding clearly has no deterrence value.

The Court of Appeals' argument that additional deterrence is not needed because *Owens-Illinois* has adequately prevented disclosure of trade secrets has no support. Moreover, the Court's argument that *Owens-Illinois* protective orders have been used in past cases where employers have not proven that trade secrets were disclosed misses the point. The Court naively assumes that, because no actions have been initiated against OSHA's private consultants, no employer trade secrets have been "leaked." The Court

simply fails to understand the importance of *deterrence*; in fact the Court has highlighted the degree to which existing remedies to deter improper disclosures are inadequate.

Only in a rare case would a private consultant so blatantly reveal trade secrets that an employer would be able to prove a case against him, due to the subtle ways in which trade secrets can be appropriated as well as the highly technical nature of the trade secrets often involved. Because of the difficulty of discovering improper disclosures and proving that confidentiality agreements or protective orders have been violated, criminal sanctions are vital to deter consultants from making unauthorized disclosures.

The only sanction the Court of Appeals left to the Commission to deter non-federal experts from disclosing trade secrets is to debar him from future OSHA cases. *Owens-Illinois, supra,* 6 O.S.H. Cas. at 2167. As recognized by the Commission, however, this "sanction" is of little value to an employer once its trade secrets are divulged. The Commission specifically distinguished *Bunker Hill Co.* v. *EPA*, 658 F.2d 1280 (9th Cir. 1981), a case relied upon by the Court, on the ground that an expert's debarment from future EPA cases would provide much greater deterrence from disclosure of trade secrets because "EPA contracts often involve millions of dollars" (*Infra* p. A20, n. 6). According to the Commission, "it has been our experience that the need for experts in OSHA inspections is not so frequent and on such a large scale that the prospect of debarment is a reliable deterrent" (*Id.*).

Unlike federal courts, the Commission does not have the power to hold an expert in contempt, or to impose fines or prison terms for violations of its protective orders (*Infra* at p. A19-A20). See, *Owens-Illinois, supra,* at 2167-68, n. 11; *Atlantic & Gulf Stevedores* v. *OSHRC,* 534 F.2d 541 (3d Cir. 1976). On the other hand, federal experts would be

subject to such penalties under the Trade Secrets Act, as recognized by the Court of Appeals. (*Infra* at p. A6, n.1). The Court fails to appreciate the importance of this difference, however.

The Commission considered and rejected the basis for the Court's decision, that confidentiality agreements in which an employer is a third-party beneficiary will provide an effective deterrent. The Commission found that confidentiality agreements are inadequate, in light of the valuable trade secrets involved and irreparable harm to an employer once its trade secrets are revealed (*Infra* at p. A21). According to the Commission,

> We share the implicit view of the Commissioners in *Owens-Illinois*, however, that the third-party beneficiary clause alone does not provide sufficient protection. The contempt sanction of a court is a swift and sure step that can be aimed directly at deterring breaches of confidentiality. By contrast, a third-party beneficiary clause of a contract gives the party whose trade secrets were disclosed only the prospect that after a long lawsuit, he might recover damages of uncertain amount from a private person of possibly modest financial means. Although the prospect of such a lawsuit would be some deterrent to the outside expert, we do not consider that deterrent to be sufficient. An employer who has suffered large damages from the disclosure of a trade secret may be unable to recover fair compensation. (*Id.*).

The Commission rightly decided that it cannot justify a rule which exposes employers' trade secrets to the world, through the conduit of private consultants, while the Commission stands by, impotent to impose any meaningful sanctions for improper disclosures. The Court of Appeals essentially ignored the Commission's concern in its ruling.

D. The Commission Could Have Required More Restrictive Precautions to Offer Even Greater Protection to Employers' Trade Secrets.

The Commission's decision will not significantly inconvenience the Secretary or delay OSHA enforcement proceedings. The decision does not prevent the Secretary from obtaining discovery nor does it prevent the Secretary from using her expert of choice (private or government). The decision simply requires the Secretary to obtain a federal court warrant or order for an expert inspection in cases where: (1) trade secrets are present; and (2) the Secretary chooses to use a non-federal expert.

The Commission decision could have gone much further, and limited the Secretary's choice of expert where trade secrets are shown. For example, the Commission could have prohibited the Secretary's use of a private consultant altogether, by limiting access of the trade secret information to *only counsel*, and denying access to the parties themselves, as well as to anyone else. In fact, "the most common kind of [protective] order allowing discovery on conditions is an order limiting the persons who are to have access to the information disclosed. . . ." 8 C. Wright and A. Miller, *Federal Practice and Procedure: Civil*, § 2043, at p. 305 (1970). See also, 2 J. Weinstein and M. Berger, *Weinstein's Evidence*, ¶508[03], at pp. 508-09, n. 19 (1982).

Courts routinely enter protective orders limiting access to trade secrets to *counsel* in the case, or which otherwise are more restrictive than the protective order sought here. For example, in *Triangle Ink and Color Co., Inc.* v. *Sherwin-Williams Co.*, 61 F.R.D. 634 (N.D.Ill. 1974), the Court ordered that trade secret information "shall be disclosed only to plaintiff's trial counsel," who "shall not disclose such confidential information to the plaintiff or its employees." 61

F.R.D. at 637. The plaintiff's trial counsel was not permitted to disclose such information to independent experts unless the defendant approved. *Id.* Virtually identical protective orders have been entered in many cases involving the need for trade secret protection. See, for example, *Spartanics, Ltd.* v. Dynetics Engineering Corporation, 54 F.R.D. 524, 527 (N.D.Ill. 1972); *Maritime Cinema Service Corp.* v. *Movies En Route, Inc.*, 60 F.R.D. 587, 589 (S.D.N.Y. 1973); *Printing Plate Supply Co.* v. *Curtis Publishing Co.*, 11 F.R.Serv.2d 33,319, Case 1 (E.D.Pa. 1967); *Hirshhorn* v. *Mine Safety Appliance Co.*, 8 F.R.D. 11 (W.D.Pa. 1948). Courts in other cases have similarly restricted disclosure of trade secrets to counsel and the parties, prohibiting disclosure to others. See, for example, *Marshwood Co.* v. *Jamie Mills, Inc.*, 10 F.R.D. 386 (N.D.Ohio 1950); and *Ampco Metal, Inc.* v. *O'Neill*, 78 N.W.2d 921 at 923 (Wis. 1956).

Other courts have ordered even greater protection of a company's trade secrets by refusing to allow the government to use a non-federal expert to conduct inspections. In *United States* v. *National Steel Corporation*, 26 F.R.D. 603 (S.D.Tex. 1960), for example, the Court held that the United States, in an antitrust suit for unfair competition against National Steel Corp., could only use federal experts to inspect the company's plant because of the presence of trade secrets. 26 F.R.D. at 607.

If an order limiting disclosure of trade secrets to counsel for a party or forbidding the Secretary from using a private consultant altogether would be an appropriate exercise of the Commission's discretion, then the order challenged here certainly cannot be criticized by the Secretary as too restrictive or as an abuse of discretion.

E. The Commission's Decision Would Not Delay or Inhibit the Secretary's Ability to Investigate OSHA Cases.

It is not disputed that World Color's plant contains protectible trade secrets throughout the plant and in the bindery department which the Secretary wishes to inspect. Nor is it disputed that the revelation and dissemination of these trade secrets, either inadvertently or intentionally, would cause irreparable injury to World Color and place it at a distinct business disadvantage relative to its competitors.

In contrast, the interests of the Secretary in inspecting World Color's facility can easily be accommodated under the procedures set forth in the Commission's ruling. The Secretary can use a private consultant for the inspection after obtaining a court inspection warrant or order. Alternatively, the Secretary can proceed with an inspection by an expert who is a federal employee, and therefore subject to the full sanctions set forth in the Trade Secrets Act.

Neither option will delay or inhibit the Secretary's ability to investigate OSHA cases or obtain expert inspection of employers' facilities. The Secretary has never articulated any reason why the use of a non-governmental expert is necessary in this case, given the fact that the Secretary has access to approximately 550 similarly qualified ergonomists already employed by the federal government whose inspection has never been opposed by the company. The Secretary's obstinate refusal to even address this issue is incomprehensible; any delay in this case is self-inflicted.

Nor does the requirement of seeking an administrative warrant or other federal court order unreasonably impede

the Secretary's discovery efforts.[3] The use of private consultants is not barred, as in the case of prior Commission precedent, *Reynolds Metals*, but merely conditioned on the obtaining of a federal district court order. Administrative warrants and orders to take discovery are routinely entered by federal courts *ex parte* or on short notice. *Donovan* v. *Red Star Marine Services, Inc.*, 739 F.2d 774, 780-84 (2d Cir.), *cert. denied*, 470 U.S. 1003 (1984); *Stoddard Lumbar* v. *Marshall*, 627 F.2d 984, 990 (9th Cir. 1980). In most cases, as here, probable cause for the inspection would not be in dispute. Even in those few cases where an employer challenges the issuance of a warrant, the Secretary would only need to establish the lesser standard of cause for the issuance of an administrative warrant in order to proceed expeditiously in conducting an inspection of the employer's premises. *Marshall* v. *Barlow's Inc.*, 436 U.S. 307, 320-321 (1978).

In the instant case, the Commission balanced the potential for irreparable injury to the petitioner and need for strong and effective deterrence against disclosures of trade secrets, against the minor inconvenience of requiring the Secretary to obtain the assistance of a federal district court in pursuing the chosen form of discovery. The Secretary has suffered no harm, other than the self-inflicted delays occasioned by her unreasonable refusal to utilize a governmental expert or the *ex parte* procedures outlined by the Commission.

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[3]In the instant case, the Secretary has never sought such an order from the district court. Following the Commission's ruling, the Secretary voluntarily declined to pursue the case, requiring the Commission to dismiss the Complaint for want of prosecution pursuant to Rule 41(b), Federal Rules of Civil Procedure. Thus, there is no evidence that the procedure mandated by the Commission would in any way be unduly burdensome.

II. The District of Columbia Circuit's reversal of the Commission's evolving policy regarding the protections needed to safeguard employer trade secrets invades the Commission's ability to establish effective and workable procedures governing OSH Act proceedings, which are particularly within the Commission's area of expertise and authority.

The Commission has considered for over a decade the best way to strike the balance between the Secretary's need for discovery in a proceeding under the OSH Act, and the employer's legitimate need for the protection of its trade secrets from improper disclosure. Congress has provided the answer in the Trade Secrets Act, 18 U.S.C. §1905, for the normal situation where the Secretary seeks the inspection of an employer's premises by an expert employed by the federal government. The Trade Secrets Act provides for criminal penalties and the full range of contempt powers exercised by federal courts to punish the improper revelation of employer trade secrets by federal employees. However, the protections of the Trade Secrets Act do not apply to private consultants who are not federal employees.

A. The Commission's Decision Represents a Principled and Rational Evolution of Its Policy Towards the Secretary's Use of Non-governmental Experts in OSH Act Proceedings.

The balancing of competing concerns when the Secretary seeks to use *non-governmental* employees as experts has proven very difficult, as the Court of Appeals acknowledged. As early as 1975, the Commission chose to continue its original policy of generally excluding non-governmental experts from workplaces where trade secrets exist, absent a showing of good cause. *Reynolds Metals Co.*, supra. Three years later, the Commission decided to experiment with

administrative agency protective orders, when it held that non-governmental experts would be permitted entry subject to a protective order issued by the Commission. *Owens-Illinois, Inc., supra.*

Subsequently, the Commission was forced to reconsider the effectiveness of its own protective orders when it found that such orders were insufficient to prevent the dissemination of confidential information. *E.I. DuPont de Nemours & Co.*, OSHRC Docket No. 80-4785, Slip Op. 5/23/86 (available on LEXIS), discussed *infra* at pp. 28-29.

Finally, in the instant case, the Commission adopted a middle ground. In *World Color II*, the Commission concluded that non-governmental experts should be permitted entry only if more stringent confidentiality conditions and penalties are provided by the issuance of an administrative warrant or other appropriate order from a federal district court.

The Commission's decision in *World Color II* merely represents the latest expression of a delicate balancing process based upon the Commission's expertise and experience in adjudicating discovery disputes in OSH Act proceedings. The Court of Appeals' decision reflects its misunderstanding of the Commission's twelve-year development of an appropriate balance between these competing interests, by referring to the decision as a departure from established precedent without reasoned explanation.

The precedent relied on by the Court of Appeals in concluding that the Commission's decision was arbitrary and capricious is inapplicable. Both *International Union, UAW* v. *General Dynamics Land Systems Division*, 815 F.2d 1570, 1578-79 (D.C. Cir.), *cert. denied* 108 S.Ct. 485 (1987), and *Brock* v. *L.R. Willson & Sons, Inc.*, 773 F.2d

1377, 1381 (D.C. Cir. 1985), concern situations where agency decisions represented dramatic reversals of long-standing policies. This is not the situation in the instant case. The question of the entry of a non-governmental expert and the appropriate protective conditions remains a matter of a case-by-case analysis. While the Commission has continued to re-examine the nature of that balancing process, it has not departed from its central policy of permitting the use of non-governmental experts if the legitimate trade secrets and confidential information of the employer can be effectively protected.

Moreover, the Commission did provide a principled and rational explanation for the balance it has chosen to strike between the interests of the Secretary and employers' trade secrets. It need do no more. *Greyhound Corp.* v. *I.C.C.*, 551 F.2d 414 (D.C. Cir. 1979). The Commission correctly identified its limited powers when dealing with a violation of a protective order by a non-governmental expert. It cannot imprison or cite for contempt the expert who improperly discloses trade secrets, or invoke the other inherent powers of a federal district court to enforce its orders. The Commission further reasoned that even its power to sanction a party would not reach a non-party following the conclusion of the proceeding.

Finally, the Commission analyzed the ineffectiveness of third-party beneficiary provisions of *Owens-Illinois* protective orders. In comparison with the "swift and sure step" of a contempt of court sanction, the Commission found that:

> By contrast, a third-party beneficiary clause of a contract gives the party whose trade secrets were disclosed only the protection that after a long lawsuit, he might recover damages of uncertain amounts from a private person of possibly modest financial means.

World Color II, infra at A21.

It is simply incorrect to assert that the Commission failed to explain the manner in which its own remedies are insufficient to protect a party's trade secrets from disclosure by a non-governmental expert. The Commission specifically found that its power of debarment is an unreliable deterrent in view of its experience that the need for experts in OSH Act inspections is infrequent and that debarment represents a very modest financial penalty. *Contrast, Bunker Hill Co.* v. *EPA*, 658 F.2d 1280, 1284 (9th Cir. 1981) (Prospect of debarment of experts from EPA proceedings more effective deterrent given "millions of dollars" of consulting contracts).

The Commission specifically referred to a case where Commission sanctions were ineffective to prevent the disclosure of trade secrets, *E.I. DuPont de Nemours & Co.*, OSHRC Docket No. 80-4785, slip op. 5/23/86 (*Infra* at p. A22, n. 7). In *DuPont* the employer complained to the Commission that a protective order had been violated. After full briefing, the Commission concluded that "the passage of time and the public dissemination of the materials" prevented the Commission from taking any effective measures to secure the return or destruction of the trade secrets. Thus, the Commission was forced to conclude that, despite any *post hoc* disciplinary proceedings, its sanctions had been ineffective to deter or prevent the improper dissemination of trade secrets.

B. The Court of Appeals Improperly Invaded the Commission's Ability to Establish Its Own Procedures to Protect Trade Secrets.

The establishment of workable and effective procedures to protect employers' trade secrets during OSH Act proceedings is an area particularly within the expertise and authority of the Commission. This Court has emphatically

declared on numerous occasions that governmental agencies should be allowed to establish their own procedures, and should not be "second-guessed" where an issue is one particularly within the agency's area of expertise. See, for example: *Federal Communications Commission* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 803-04, 98 S.Ct. 2096, 2116 (1978) (the Court of Appeals was held to have improperly struck down FCC regulations on the common ownership of a broadcast station and newspaper in the same community); and *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285-86, 95 S.Ct. 438, 442 (1974) (the district court improperly set aside an Interstate Commerce Commission order approving issuance of certificates allowing certain commodity transporters to use the same routes.).

The extremely narrow scope of review to be applied by the Court of Appeals under the "arbitrary and capricious" test is not disputed. As stated by the Supreme Court in *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, supra,

> Under the "arbitrary and capricious" standard the scope of review is a narrow one. A reviewing court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park* v. *Volpe, supra*, 401 U.S. at 416, 91 S.Ct. at 824. The agency must articulate a "rational connection between the facts found and the choice made." *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 246, 9 L.Ed.2d 207 (1962). *While we may not supply a reasoned basis for the agency's action that*

> *the agency itself has not given, SEC* v. *Chenery Corp.*, 332 U.S. 194, 196, 67 S.Ct. 1575, 1577, 91 L.Ed. 1995 (1947), *we will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned. Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581, 595, 65 S.Ct. 829, 836, 89 L.Ed. 1206 (1945).

419 U.S. at 286-87, 95 S.Ct. at 442 (emphasis supplied). Ignoring these well-established principles, the Court of Appeals in this case has substituted its judgment for that of the Commission, under the guise that the Commission's modified procedure for protecting trade secrets is unsupportable.

The Commission in fact has codified its *World Color II* holding. The Commission promulgated a rule requiring the Secretary to obtain an inspection warrant or federal court order in cases where she wishes to use private consultants where an employer has trade secrets, pursuant to the notice and comment procedures of the Administrative Procedure Act, 5 U.S.C. § 553. The Commission's rule was enacted pursuant to ongoing rule-making proceedings, and expressly permits ALJs to "decline to permit disclosure of [trade secrets] to persons against whom the Commission could not enforce the order," and to stay any case to allow a person seeking entry upon land for discovery purposes "an opportunity to seek an order of a Court or search warrant with protective conditions." 29 C.F.R. § 2200.11(f) (1986).

The Secretary, as well as members of industry and other governmental agencies, submitted voluminous comments both in favor and against the proposed rule to the Commission for its consideration. The Commission promulgated this rule after considering this input together with the recommendations of a Rules Committee made up of ALJs and after four days of debate which was open to the public. Although obviously unhappy with the new rule, the Secre-

tary declined to seek judicial review although she could have done so under the Administrative Procedure Act. 5 U.S.C. § 704.

The Commission has promulgated this new rule in connection with its responsibility to establish effective and fair procedures to protect employer trade secrets during OSH Act proceedings. All affected parties, including both the Secretary and employers, had the opportunity to comment upon the Commission's proposed rule, and to seek judicial review of the final rule. The Secretary has blatantly attempted to circumvent these procedures by challenging the rule in the context of an individual case (*World Color II*), while declining to appeal the promulgated rule. The Secretary's attempt to sabotage the Commission's ability to establish its own rules should not be allowed.

III. The doctrine of collateral estoppel precludes the Secretary from relitigating the question whether she may use non-governmental consultants to inspect World Color's workplace when to do so would jeopardize the Company's trade secrets, since that question has already been fully litigated by these parties and decided in World Color's favor.

Collateral estoppel offers another reason why the Court of Appeals decision should be reversed. The Secretary should be barred under the doctrine of mutual defensive collateral estoppel from relitigating the circumstances under which the Secretary may use a non-federal consultant to inspect World Color's workplace, since that question has already been fully litigated by these parties and decided in World Color's favor. *United States* v. *Stauffer Chemical Co.*, 465 U.S. 165, 170, 104 S.Ct. 575, 578-79 (1984). In *World Color I*, the Secretary fully litigated this same issue, and lost. Having decided to withdraw his appeal to the Seventh

Circuit in that case, the controlling law as between these parties is set forth in *World Color I* until changed or overruled by the Seventh Circuit or the Supreme Court. The Secretary may only use government employees to inspect World Color's plants having trade secrets, unless he shows good cause for the need to use a private consultant.

This Court can dispose of this case without having to review the Commission's decision on its merits by merely recognizing the collateral estoppel effect of *World Color I*, which is the controlling law as between these parties. That decision in no way prevents the Secretary from challenging Commission decisions on this issue as to other employers, or seeking review of those decisions in appropriate cases. This is not such a case. To further the strong public policy against forum shopping and in the interests of finality of judgments and fundamental fairness, the Secretary should be estopped from relitigating this question against World Color.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

WORLD COLOR PRESS, INC.,
Petitioner

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September 21, 1988

APPENDIX

843 FEDERAL REPORTER, 2d SERIES

GRAPHIC COMMUNICATIONS INTERNATIONAL UNION, LOCAL 554, *Petitioner.*

v.

SALEM-GRAVURE DIVISION OF WORLD COLOR PRESS, INC., and Occupational Safety and Health Review Commission, *Respondents.*

Ann McLAUGHLIN, Secretary of Labor, *Petitioner.*

Graphic Communications International Union, Local 554, *Intervenor.*

v.

SALEM-GRAVURE DIVISION OF WORLD COLOR PRESS, INC., and Occupational Safety and Health Review Commission, *Respondents.*

Nos. 87-1191, 87-1293.

United States Court of Appeals,
District of Columbia Circuit.

Argued Feb. 16, 1988.

Decided April 15, 1988.

As Amended April 25, 1988.

Union and Secretary of labor petitioned from an order of the Occupational Safety and Health Review Commission. The Court of Appeals, Wald, Chief Judge, held that decision of the Commission that in an OSHA citation proceed-

ing, the Secretary of Labor must obtain federal District Court authorization before directing a private expert to conduct a discovery inspection was arbitrary and capricious.

Reversed.

1. Judgment—739

Issue preclusion does not apply when there has been an intervening change in legal principles.

2. Judgment—739

Doctrine of issue preclusion did not bar consideration of issue whether the Secretary of Labor is required to obtain federal district court authorization before directing a private expert to conduct a discovery inspection of employer's premises in a OSHA citation enforcement proceeding, where there had been a change in governing law since prior case.

3. Administrative Law and Procedure—763

Agency decisions that depart from established precedent without a reasoned explanation will be vacated as arbitrary and capricious.

4. Labor Relations—32

Decision of the Occupational Safety and Health Review Commission that in an OSHA citation enforcement proceeding, the Secretary of Labor must obtain federal district court authorization before directing a private expert to conduct a discovery inspection of an employer's premises was arbitrary and capricious; Commission's conclusory statements and conjecture could not substitute for reasoned explanation. Occupational Safety and Health Act of 1970, § 2 et seq., as amended, 29 U.S.C.A. § 651 et seq.

Petitions for Review of an Order of the Occupational Safety and Health Review Commission.

Jeffrey A. Hennemuth, Atty., Dept. of Labor, with whom Allen H. Feldman, Associate Sol. and Mary-Helen Mautner, Counsel for Appellate Litigation, Dept. of Labor, Washington, D.C., were on the brief, for petitioner, Ann McLaughlin, Secretary of Labor.

Eugene Cotton and Thomas D. Allison, Chicago, Ill., entered appearances for petitioner, Graphic Communications Intern. Union, Local 554 in No. 87-1191.

Michael D. Freeborn, with whom Steven M. Hartmann, Chicago, Ill., and Harvey G. Sherzer, Washington, D.C., were on the brief for respondent, World Color Press, Inc.

Thomas D. Allison, Chicago, Ill., was on the brief for intervenor, Grapic Communications Intern. Union, Local 544 in No. 87-1293.

Before WALD, Chief Judge, ROBINSON and BOGGS*, Circuit Judges.

Opinion for the Court filed by Chief Judge WALD.

WALD, Chief Judge:

Petitioner—Secretary of Labor (Secretary) and petitioner Graphic Communications International Union, Local 554 (Local 554), seek review of the Occupational Safety and Health Review Commission's (OSHRC or Commission) decision that in an Occupational Safety and Health

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* Of the United States Court of Appeals for the Sixth Circuit, sitting by designation pursuant to 28 U.S.C. § 291(a).

Act of 1970 (OSHA), 29 U.S.C. § 651 *et seq.*, citation enforcement proceeding, the Secretary must obtain federal district court authorization before directing a nonfederal employee expert to conduct a discovery inspection of an employer's premises. *Secretary of Labor* v. *Salem—Gravure Division of World Color Press, Inc.*, No. 83-509 (OSHRC, Sept. 3, 1986); Joint Appendix (J.A.) at 56. Because we rule that this change in longstanding Commission policy is based on the Commission's unsupported conclusion of the "unenforceability of [its] . . . own protective orders against third party consultants," *see* J.A. at 64, we reverse the decision as arbitrary and capricious.

I. Background

A. *Facts of the Case*

In April, 1983, the Secretary inspected the bindery department of a plant owned by appellee-World Color Press, Inc. (World Color), a company in the printing business. World Color operates two neighboring plants, one in Effingham, Illinois (Crossroads Press), the other in Salem, Illinois (Salem-Gravure). The first was the subject of Commission litigation in 1977, subsequent to an OSHA citation alleging violation of noise standards. *See World Color Press, Inc.*, 6 OSH Cas. (BNA) 1084, [1977-1978] O.S.H. Dec. (CCH) ¶ 22,358 *(World Color I)*. Then in May, 1983, the Secretary again issued a citation, charging World Color with an OSHA violation in its Salem-Gravure plant. The present petition for review arises from this event. Machinery in the bindery department was said to cause "undue repetitive motion trauma," constituting an infringement of OSHA's "general duty" clause. *See* 29 U.S.C. § 654(a)(1). World Color contested the citation. After initial pleadings, the Secretary requested permission to have its private consultants enter the Salem-Gravure plant for discovery inspection

purposes.[1] World Color objected, opposing the entry of private consultants on the ground that only government employees are subject to criminal sanctions for disclosing trade secrets, hence thay alone would be deterred from disclosing these secrets. The Secretary moved for an order from the Administrative Law Judge (ALJ) to compel entry. After a hearing, the ALJ ordered World Color to permit the Secretary's outside expert to enter its plant subject to the protective measures set forth in *Owens-Illinois, Inc.*, 6 OSH Cas. (BNA) 2162, [1978] O.S.H.Dec. (CCH) ¶ 23,218. (In *Owens-Illinois*, the Commission relaxed its general bar against the use of nongovernmental expert provided that the expert signed an oath not to disclose trade secrets, and that the employer was made a third-party contract beneficiary of the oath.) World Color sought immediate review of this entry order.

On interlocutory appeal, the Commission stated that it lacks the authority to impose adequate sanctions against nongovernmental experts who violate its protective orders. It overruled *Owens-Illinois* "to the extent that [it] . . . held otherwise. . . ." *Secretary of Labor v. Salem-Gravure Dirision of World Color Press, Inc.*, No. 83-509, at 9 (OSHRC, Sept. 3, 1986); J.A. at 64. The Commission "concluded that if the Secretary wants to use a nonfederal employee expert

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[1] Pursuant to 29 C.F.R. § 2200.2(b), the Commission adheres to the Federal Rules of Civil Procedure. 29 U.S.C. § 661(g). Rule 34(a)(2) states that any party may request entry on another party's property "for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon. . . ." Fed.R.Civ.P. 34(a)(2); *see also* 29 U.S.C. §§ 657 (Secretary has authority to make inspections of employers' premises), 658 (Secretary has authority to issue citations for violations that are discovered).

to conduct a discovery inspection, and if the employer establishes the existence of trade secrets," then the ALJ must "stay Commission proceedings to allow the Secretary to obtain an inspection warrant" from a federal district court, which warrant would be backed by the court's contempt power. *Id.* at 9-10; J.A. at 64-65. Following this ruling, the Secretary elected not to prosecute the citation for lack of informed testimony; and on January 26, 1987, the ALJ granted World Color's motion to dismiss the case.

The Secretary and Local 554 (hereinafter referred to collectively as the Secretary) petition for review of the Commission's order contending that it was arbitrary and capricious action, unsupported by evidence and mistaken as to the scope of federal district court jurisdiction.

B. *Legal History*

Periodically, the Commission has reconsidered the circumstances under which the Secretary may use nongovernmental experts to inspect the premises of employers who have demonstrated the presence of trade secrets therein.[2] The two competing concerns, namely employers' need for confidentiality and the Secretary's need for thorough inspections and discovery, have proven difficult to balance. First, in 1975, the Commission reiterated its policy that generally excluded nongovernmental experts from workplaces where trade secrets exist. *See Reynolds Metal Co.*, 3 OSH Cas. (BNA) 1749, [1975-76] O.S.H. Dec. (CCH) ¶ 20,214. Three years later, the Commission decided *Owens-Illinois, Inc.*, 6 OSH Cas. (BNA) 2162. The Secretary's nongovernmental expert was permitted entry subject to several protec-

[2] Unlike federal employees, private consultants are not subject to the criminal sanctions of the Trade Secrets Act, 18 U.S.C. § 1905.

tive measures: (1) employers could refuse entry when they could show that the selected expert was associated with a business competitor; (2) the expert had to sign an oath not to disclose trade secrets except to the Secretary or in Commission litigation; (3) the expert had to enter into a confidentiality agreement with the Secretary, which agreement specified the employer as a third-party beneficiary; and (4) the protective order, and its attendant sanctions upon violation, would be applied to all persons acting on the Secretary's behalf. *Id.* at 2167-68. *Ownens-Illinois* protective orders gained quick acceptance. *See e.g., Fred's Frozen Foods, Inc.*, 7 OSH Cas. (BNA) 1271, [1979] O.S.H. Dec. (CCH) ¶ 23,461; *see also* Brief of Petitioner, at 21-22 & n. 16 (citing cases); 50 ALR Fed. 906, 912-13 (1980 & 1987 Supp.) (same). Modifications or additional protections allowed flexibility; indeed, in the present case, the expert was to be confined to specific locations inside the Salem-Gravure plant and was directed to surrender all notes and photographs to the Secretary's counsel.

In spite of the line of cases subsequent to *Owens-Illinois* that applied these protective measures, the Commission decided in the ruling now on review that it "lacks the authority to impose sufficient sanctions against a nonfederal expert who violates our protective order." *Secretary of Labor* v. *Salem-Gravure Division of World Color Press, Inc.*, No. 83-509, at 8 (OSHRC, Sept 3, 1986); J.A. at 63. The Commission overruled the holding of *Owens-Illinois* to the contrary. *Id.* at 9; J.A. at 64. Refusing to retreat to the *Reynolds Metal Co.* bar to nongovernmental expert discovery inspection, the Commission declared that, when an employer establishes the existence of trade secrets, the Commission would stay its proceedings to allow the Secretary to obtain an inspection warrant or other appropriate order in a federal district court that authorizes the inspec-

tion he desires and contains nondisclosure provisions that would bring the nonfederal expert under the court's contempt authority.

Secretary of Labor v. *Salem-Gravure Division of World Color Press, Inc.*, No. 53-509, at 10 (OSHRC, Sept 3, 1986) (footnote omitted): J.A. at 65.

II. ANALYSIS

A. *Present Action Is Not Barred By Issue Preclusion (Collateral Estoppel) Bar*

[1, 2] World Color makes the threshold argument that the doctrine of issue preclusion (collateral estopple) bars our consideration of this case. In *World Color I*, the Secretary unsuccessfully sought to conduct discovery inspection of appellee's Crossroads Press plant by an outside expert in acoustical engineering. The Commission adhered to its *Reynolds Metal Co.* decision that, absent good cause, on-site inspection by a private consultant would be prohibited when the entry might endanger the confidentiality of a company's trade secrets. Even though the Secretary now attempts to relitigate this issue of nongovernmental expert inspection, issue preclusion does not apply when there has been an intervening change in legal principles. *Commissioner* v. *Sunnen*, 333 U.S. 591, 599, 68 S.Ct 715, 720, 92 L.Ed. 898 (1948). World Color errs when it states that "there has been no change in the controlling law" since *World Color I*. Brief of Respondent, at 17. In 1978, the Commission in *Owens-Illinois* expressly overruled *World Color I* and the good cause restriction. *Owens-Illinois, Inc.*, 6 OSH Dec. (BNA) 2162, 2165. Because the *Owens-Illinois* decision has changed the governing law, we agree with the Commission, *see Secretary of Labor* v. *Salem-Gravure Division of World Color Press, Inc.*, No. 83-509 (OSHRC, Sept. 3, 1986);

J.A. at 64 n. 8, that issue preclusion doctrine does not bar the Secretary's present action.

B. *Commission Ruling Was Arbitrary and Capricious*

[3] Agency decisions that depart from established precedent without a reasoned explanation will be vacated as arbitrary and capricious. *See International Union, UAW* v. *General Dynamics Land Systems Division,* 815 F.2d 1570, 1578-79 (D.C.Cir. 1987); *Brock* v. *L.R. Willson & Sons, Inc.,* 773 F.2d 1377, 1381 (D.C.Cir. 1985). The Secretary's claim of arbitrary and capricious Commission action centers on the argument that the Commission did not supply any adequate reasons to expand protection beyond the *Owens-Illinois* safeguards to include a requirement of a federal court warrant before a nongovernmental expert would be allowed to conduct discovery in an employer's plant.[3]

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[3]Even were we to find adequate explanation for a departure from *Owens-Illinois,* we are skeptical that the particular departure made by the Commission is in accordance with law. The Commission does not cite any statutory or decisional authority for its assumption that district courts possess authority to issue discovery orders while a citation enforcement proceeding is pending. Instead, the Commission and appellee refer to 29 U.S.C. §§ 161, 657 [section 8], which specifically authorizes federal district courts' involvement in other stages of OHSA proceedings. These provisions are designed to ensure compliance with, not to replace, Secretary and Commission actions. Quite distinct, the order on review interposes courts to perform a duty Congress expressly empowered the Secretary and Commission to perform, namely, "issu[ing] such orders as may be appropriate to protect the confidentiality of trade secrets." 29 U.S.C. § 664.

Section 8 and 29 U.S.C. § 161 do not narrow this authority. Indeed, § 8(a) authorizes the Secretary "to enter . . . . inspect, and investigate any place of employment." "[i]n order to carry out the purposes of this chapter [chapter 15] . . . ." 29 U.S.C.

[4] The Commission makes several conclusory statements to demonstrate its inability to impose meaningful sanctions against private consultants. Debarment is said to carry too little deterrent. Also, like dismissal of a citation order, debarment offers no compensatory relief to the party injured by disclosed trade secrets. This attention to the

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§ 657(a). The purpose of chapter 15 is the broad one of "assur[ing] so far as possible every working man and woman in the Nation safe and healthful working conditions . . . ." 29 U.S.C. § 651. Section 8(b) makes this assignment to the Secretary certain: "In making his inspections and investigations [precitation] under this chapter the Secretary may require the attendance and testimony of witnesses and the production of evidence . . . ." The section then adds that "[i]n case of a contumacy, failure, or refusal of any person to obey such an order," the Secretary may seek to enforce the subpoenas in federal district court. 29 U.S.C. § 657(b). Unlike the order on review, therefore, this provision anticipates that district courts will enforce agency actions, not interrupt them.

Similarly, 29 U.S.C. § 161(1) (Commission power to issue subpoenas requiring production of evidence during its investigations), which is incorporated into OSHA by 29 U.S.C. § 661(i), also involves federal district courts only at this secondary, enforcement stage. *See* 29 U.S.C. § 161(2). Much different, the Commission order now on review indicates that the Secretary must seek the federal court order while proceedings are stayed before the ALJ. *See* J.A. at 65. This would seem to conflict with § 161(2)'s requirement that a Commission order precede recourse to the federal judiciary. Again, the implication is clear: Congress vested the Commission with sufficient authority to carry out OSHA responsibilities; Congress did not contemplate that the Commission would delegate these duties to the federal judiciary. *Cf. Oil, Chemical & Atomic Workers International Union* v. *OSHRC*, 671 F.2d 643, 652 (D.C.Cir.) (Commission was designed to function as district court), *cert. denied*, 459 U.S. 905, 103 S.Ct. 206, 74 L.Ed.2d 165 (1982).

alleged inefficacy of barring attorneys from Commission proceedings, however, is misplaced. *Owens-Illinois* mentioned debarment as only one of several, supplementary Commission disciplinary powers. *Owens-Illinois, Inc.*, 6 OSH Dec. (BNA) 2162, 2167. The *Owens-Illinois* holding is founded on protective orders requiring nondisclosure, which employers may enforce through third-party beneficiary clauses.[4] Because the Commission cannot point to a single case where this protection was insufficient—where disclosure occurred in violation of an *Owens-Illinois* confidentiality agreement—it focuses instead on the strength of federal district court contempt sanctions. That strength, itself controversial, *see* Brief of Petitioner, at 23-24 & n. 17, is immaterial without evidence that the *Owens-Illinois* measures are inadequate. No such evidence is provided. Nor is evidence offered to disprove the efficacy of similar confidentiality agreements applied by federal courts. *See, e.g., United Steelworkers of America* v. *Auchter*, 763 F.2d 728 (3d Cir. 1985); *Bunker Hill Co.* v. *EPA*, 658 F.2d 1280 (9th Cir. 1981). Rather, the Commission simply declared that third-party beneficiary clauses may lead to protracted litigation and that damages may be too small. Because this conjecture cannot substitute for a reasoned explanation, and because Congress has expressly assigned to the Commission the authority to issue protective orders to protect employers' trade secrets, *see* 29 U.S.C. § 664, we must reverse the Commission's ruling as arbitrary and capricious.

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[4]The Commission emphasizes that the Secretary has taken the position that the Commission cannot enforce its protective orders once a final order on an underlying citation has been entered. *See* J.A. at 64 n. 7. It was this concern, however, that prompted the Commission in *Owens-Illinois* to include the third-party beneficiary provision. *Owens-Illinois, Inc.*, 6 OSH Dec. (BNA) 2162, 2167, 2167-68 n. 11.

In delegating to the Commission comprehensive authority to ensure the safety of workplaces across America, Congress did not envision that, as early as the discovery stage, Commission powers would be so circumscribed as to require repeated federal interventions. Accordingly, we vacate the Commission's involuntary dismissal of this case resulting from its order denying discovery, and reinstate—for consideration consistent with this holding—the Secretary's motion for enforcement of discovery.

It is so Ordered.

SALEM-GRAVURE DIVISION OF WORLD COLOR PRESS INC.

Occupational Safety and Health Review Commission

SECRETARY OF LABOR, Complainant v. SALEM-GRAVURE DIVISION OF WORLD COLOR PRESS INC., Respondent, OSHRC Docket No. 83-509, Sept. 3, 1986.

John H. Secaras, U. S. Department of Labor, Chicago, Ill., for complainant.

Michael D. Freeborn, Chicago, Ill., for respondent.

Administrative Law Judge Paul A. Tenney.

Before Buckley, Chairman: Rader and Wall, Commissioners.

TRADE SECRETS

1. Entry into Plant by Non-Government Employee — Insufficiency of Commission Protective Order ➢ 37.01 ➢ 50.45

Only sanction available in event secretary's consultant, who is not federal employee, would violate commission's protective order would be to debar consultant from appearing before commission; therefore, type of protective order contemplated by *Owens-Illinois,* 6 OSHC 2162 (1978), which would give employer right to challenge secretary's choice of consultant, require consultant to sign oath of nondisclosure, and make employer third-party beneficiary to consultant's nondisclosure contract with secretary, confers insufficient protection for trade secrets, and to extent case held otherwise, it is overruled.

2. Entry into Plant by Non-Government Employee — Insufficiency of Commission Protective Order — Necessity of Court Warrant ➢ 37.01 ➢ 50.45

Warrant issued by federal district court, which would authorize inspection of plant by secretary's consultant and prohibit consultant from disclosing employer's trade secrets, is only way to protect interests of both secretary and employer; therefore, commission order permitting entry of secretary's consultant, who is not federal employee, into plant to determine potential abatement measures is vacated and case is remanded so that judge can stay proceedings in event secretary applies for warrant from court.

Full Text of Decision

BY THE COMMISSION:

This case is before the Commission on Chief Administrative Law Judge Paul A. Tenney's certification of interlocutory appeal.

Judge Tenney determined that Salem's plant contains trade secrets. The Secretary desires to reinspect Salem's plant with a consultant who is not a government employee,

and thus not subject to sanctions for disclosure of trade secrets under the Trade Secrets Act, 18 U.S.C. § 1905. Judge Tenney ordered Salem to permit the Secretary's consultant to enter its plant subject to a protective order such as was approved in *Owens-Illinois, Inc.*, 78 OSAHRC 105/C8, 6 BNA OSHC 2162, 2167-2168, 1978 CCH OSHD ¶ 23,218, pp. 28,072-28,073 (No. 77-648, 1978). Salem objects to entry by a consultant who is not subject to sanctions under the Trade Secrets Act, 18 U.S.C. § 1905, contending that the Commission's protective order by itself provides no real protection against disclosure of its trade secrets. Thus, we are directly faced with the issue of whether our protective orders provide meaningful protection against disclosure of trade secrets by nongovernment employees. Concomitantly, if our protective orders do not provide meaningful protection against disclosure of trade secrets, should we nonetheless seek to compel entry by imposition of sanctions against the employer? We answer both questions in the negative.

I.

In April of 1983, the Secretary conducted an inspection of the company's Salem, Illinois workplace. On May 25, 1983, the Secretary issued a citation alleging that Salem violated 29 U.S.C. § 654(a)(1), section 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C §§ 651- 678 ("the Act"), by exposing certain employees working in its bindery department "to the hazard of undue repetitive motion trauma." Salem contested the citation. After the Secretary filed a complaint and Salem filed an answer, the Secretary requested permission to enter Salem's workplace "for the purpose of inspecting, measuring, testing, surveying, photographing or sampling [Salem's] Bindery Department with respect to determination of abatement measures available to reduce employee exposure to repeti-

tive motion trauma." In response, Salem stated that it had no objection to the entry of "full-time government employees," but did object to the entry of "independent or private consultants, other than full-time government employees .... to protect valuable trade secrets and other commercial or proprietary information of great value, in its workplace." The Secretary then moved for an order compelling entry from the judge. The Secretary stated that he was willing to have Dr. Armstrong, his outside consultant, sign a written oath promising not to disclose trade secret information obtained during his inspection of Salem's establishment, except to the Secretary or his representatives. In response, Salem moved for a protective order. It claimed that the trade secrets and commercial information observable at its plant could be adequately protected only by precluding disclosure to those "most likely to inadvertently or deliberately disclose it to or permit its utilization by [Salem's] competitors." Salem claims that such protection is possible only if entry into its bindery department is limited to counsel for the Secretary and full-time government employees, both of whom are subject to the criminal sanctions against disclosure of trade secrets that are contained in the Trade Secrets Act, 18 U.S.C. § 19.05, which is quoted at length below.

Following a hearing, at which Salem introduced evidence that its plant contains trade secrets, Judge Tenney found that Salem had proven that trade secrets were present in its bindery department. He also ordered Salem to permit the Secretary's expert to enter its plant on the condition that the protective measures outlined in *Owens-Illinois*, 6 BNA OSHC at 2167-68, 1978 CCH OSHD at 28,072-73, be followed. These measures, which we discuss below in greater detail, are: (1) the affording to the employer an opportunity to challenge the Secretary's choice of expert on the ground that he is closely aligned with a competitor of the employer;

(2) the signing by the expert of a written oath that trade secrets will not be disclosed except to the Secretary's representatives or during litigation before the Commission; (3) the inclusion in the Secretary's contract with the expert of a nondisclosure provision identical to the oath and making the employer a third-party beneficiary of it; and (4) the application of the protective order to those acting on the Secretary's behalf. Judge Tenney also restricted the inspection to the areas of the bindery department described in the citation, and ordered that any notes or photographs taken by the outside consultant in the course of the discovery inspection be surrendered to the Secretary's counsel in order to be subject to the Trade Secrets Act.

At Salem's request, Judge Tenney certified his order for interlocutory appeal on two issues: first, whether a Commission decision involving Salem's parent company, *World Color Press, Inc.*, 77 OSAHRC 202/B9, 6 BNA OSHC 1084, 1977-78 CCH OSHD ¶ 22,358 (No. 76-2005, 1977), *appeal dismissed*, 78-1010 (7th Cir. July 14, 1978), collaterally estopped the Secretary from using an outside expert; and second, under what circumstances the Secretary may use an outside expert to inspect a plant with trade secrets.

The Commission also asked the parties to discuss two additional issues; whether the Secretary's expert is or could be made "an employee of the United States" within the meaning of the Trade Secrets Act; and what means are available to the Commission or any other party to enforce a protective order issued by the Commission.

II.

If an outside expert were covered by the Trade Secrets Act[1] and subject to the same threat of criminal prosecution that discourages disclosure of trade secrets by employees of the Department of Labor, our decision would be an easy one. Both parties agree, however, that Dr. Armstrong would not be covered by the Trade Secrets Act because he is not an "employee of the United States."

The Secretary states that he cannot hire outside experts as employees because he must pay outside experts at a daily rate in excess of that allowed by section 7(c)(2) of the Act; the pay of independent contractors, however, is not restricted by section 7(c)(2). Hence for economic reasons,

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[1] The Trade Secrets Act provides:

> Whoever, being an officer or employee of the United States or of any department or agency thereof, or agent of the Department of Justice as defined in the Antitrust Civil Process Act (15 U.S.C. 1311-1314), publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return of copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

the Secretary asserts he is unable to hire Dr. Armstrong as a federal employee.[2]

Since the Secretary elects to hire an expert as a nonfederal employee, we must therefore consider to what extent the Commission can protect trade secrets through the enforcement of its protective orders. Section 15 of the Occupational Safety and Health Act, 29 U.S.C. § 664, grants the Commission authority to issue orders protecting the confidentiality of trade secrets. Section 15 states that:

> All information reported to or otherwise obtained by the Secretary or his representative in connection with any inspection or proceeding under the Act which contains or which might reveal a trade secret referred to in section 1905 of title 18 of the United States Code shall be considered confidential for the purpose of that section except that such information may be disclosed to other officers or employees concerned with carrying

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[2] It is not clear whether an outside expert can be made a federal employee through a contractual provision. In any event, even if this could be done, we question whether the Trade Secrets Act would apply once the expert left federal service. From the wording of the Trade Secrets Act, it appears that it applies to acts committed only as long as one is an "employee of the United States." There is no indication in the language of the Trade Secrets Act that it applies forever to those who once were "employee(s) of the United States." The Trade Secrets Act requires the imposition of a sanction that presupposes current employment; it states that a violator "shall be removed from office or employment." It also does not refer to former government employees. By contrast, 18 U.S.C. § 207, a criminal provision of the Ethics in Government Act of 1978, is directed at persons whose employment with the government has ceased. In light of the strict construction given criminal statutes, we think it unlikely that the Trade Secrets Act would apply to conduct that occurred after federal employment has ceased.

out this Act or when relevant in any proceeding under this Act. In any such proceeding the Secretary, the Commission, or the court shall issue such orders as may be appropriate to protect the confidentiality of trade secrets.

Commission Rule 11, 29 C.F.R. § 2200.11, also provides for the protection of trade secrets.[3] Thus, the Commission may issue protective orders establishing the conditions under which parties may have access to trade secrets.

In *Owens-Illinois*, the Commission observed that protective orders have been used by federal courts to deal with situations in which trade secrets were to be disclosed in discovery. However, there is a very significant difference between a protective order issued by a federal court, and an order issued by the Commission. If an independent expert in a federal court action violates a protective order issued under Fed.R.Civ.P. 26(c)(7),[4] he may be cited for con-

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[3] Commission rule 11 provides:

Protection of trade secrets and other confidential information.

Upon application by any person, in a proceeding where trade secrets or other matters may be divulged the confidentiality of which is protected by 18 U.S.C. 1905, the Judge shall issue such orders as may be appropriate to protect the confidentiality of such matters

See also Fed.R.Civ.P. 26(c)(7) (protective orders for trade secrets), note 5 *infra*.

[4] Rule 26(c)(7) provides:

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embar-

tempt, 18 U.S.C. § 401 empowers a federal court to punish by fine or imprisonment those it finds in contempt for disobeying its orders.[5] The Commission, however, is not a federal court. If Salem's trade secrets were disclosed by the Secretary's outside expert in violation of Judge Tenney's protective order, the Commission could do nothing to the outside expert but debar him from appearing before the Commission.[6] It has no authority to fine or imprison him for violating the order. Although Commission Rule 54 and Fed. R. Civ. P. 37 together provide that the Commission may vacate the citation if the Secretary violates a protective order, or may vacate the notice of contest if the employer

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rassment, oppression, or undue burden or expense, including . . .(7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way.

[5] 18 U.S.C. § 401 states:

§ 401. *Power of court*

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

[6] At least one court of appeals has found that an agency's ability to debar an expert is "not a light penalty in view of the fact that EPA contracts often involve millions of dollars." *Bunker Hill Co. v. EPA*, 658 F 2d 1230. 1284 (9th Cir. 1981). Without disagreeing with the court's reasoning, it has been our experience that the need for experts in OSHA Inspections is not so frequent and on such a large scale that the prospect of debarment is a reliable deterrent.

violates the order, these sanctions are available only against the parties, and then only if the case is still pending before the Commission or an administrative law judge. They cannot be used to sanction an outside expert who discloses trade secrets.

We thus conclude that the Commission lacks the authority to impose sufficient sanctions against a nonfederal expert who violates our protective order. The Commission's decision in *Owens-Illinois* relied in part on the prospect that a private lawsuit against the outside expert would deter disclosure, for it required that the contract between the Secretary and outside expert contain a third-party beneficiary clause. Unlike the other sanctions contemplated by *Owens-Illinois,* this sanction does not depend on or require Commission action. We share the implicit view of the Commissioners in *Owens-Illinois,* however, that the third-party beneficiary clause alone does not provide sufficient protection. The contempt sanction of a court is a swift and sure step that can be aimed directly at deterring breaches of confidentiality. By contrast, a third-party beneficiary clause of a contract gives the party whose trade secrets were disclosed only the prospect that after a long lawsuit, he might recover damages of uncertain amount from a private person of possibly modest financial means. Although the prospect of such a lawsuit would be some deterrent to the outside expert, we do not consider that deterrent to be sufficient. An employer who has suffered large damages from the disclosure of a trade secret may be unable to recover fair compensation.

[1] We therefore conclude that the protective order contemplated by *Owens-Illinois* confers insufficient protection for trade secrets. To the extent that *Owens-Illinois* held

otherwise, it is overruled.[7] The question remains of what relief we should afford the parties. Section 7(c)(2) of the Act authorizes the Secretary to "employ experts and consultants" while section 15, which requires us to issue protective orders for trade secrets, does not empower us to directly enforce such orders. We cannot fairly impose sanctions against an employer for his unwillingness to risk the irreparable loss of his trade secrets when that risk of loss is due to the unenforceability of our own protective orders against third party consultants. On the other hand, we are reluctant to return to *Reynolds Metals Co.*, 78 OSAHRC 51/Fl, 3

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[7]The secretary contends that an *Owens-Illinois* protective order would provide adequate protection to the employers. However in a proceeding before an Administrative Law Judge in *E.I. du Pont de Nemours & Co.*, OSHRC Docket No. 80-4785 (ALJ. Dec. 15, 1982), *proceeding terminated by Commission order*, 86 OSAHRC . (May 23, 1986), when it was alleged that a protective order prohibiting the disclosure of confidential medical information had been violated, the Secretary took the position that the Commission had no jurisdiction to enforce a protective order after the entry of a final order on the underlying citation.

Salem's argument that the Secretary is collaterally estopped from using an outside expert plays no part in our decision to overrule *Owens-Illinois* in part. The doctrine of collateral estopped has no application where there has been an intervening change in legal principles that renders a prior determination erroneous. *Commissioner* v. Sunnen, 333 U.S. 591, 599 (1948) *World Color Press*, the case relied on by Salem, followed Commission precedent established in *Reynolds Metal Co.*, 78 OSAHRC 51/Fl. 3 BNA OSHC 1749, 1975-76 CCH OSHD ¶ 20.214 (No. 4385. 1975), which restricted the Secretary to the use of federal employees in trade secret inspections unless a good cause showing was made that the presence of an outside expert was necessary. Before this present litigation was brought, *World Color Press* was overruled in *Owens-Illinois*, which placed no such restriction on the use of outside experts by the Secretary.

BNA OSHC 1749, 1975-76 CCH OSHD ¶ 20,214 (No. 4385, 1975), and generally exclude outside experts from workplaces where trade secrets could be observed. Rather than adopt a hard and fast rule, we prefer to strike a balance between the employer's need for confidentiality and the Secretary's need for discovery. We have concluded that if the Secretary wants to use a nonfederal employee expert to conduct a discovery inspection, and if the employer establishes the existence of trade secrets and declines to abide by the Commission's order compelling entry for fear of losing his trade secrets, we will stay Commission proceedings to allow the Secretary to obtain an inspection warrant or other appropriate order in a federal district court that authorizes the inspection he desires and contains nondisclosure provisions that would bring the nonfederal expert under the court's contempt authority.[8]

In our opinion a warrant or other appropriate order is the only way to protect the interests of both parties. On the one hand, the Secretary has asserted entry by an outside expert is needed to determine the measures necessary to reduce employee exposure to repetitive motion trauma, which the Secretary must prove to establish Salem's violation of section 5(a)(1) of the Act. On the other hand, Salem has demonstrated that it has an actual expectation of privacy with respect to certain portions of its workplace that contain trade secrets. This is an expectation that is protected by law, as evidenced by the Trade Secrets Act, section 15 of

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[8]In the typical case involving an inspection by a nonfederal expert, the administrative law judge would be required to hold a hearing if the Secretary disagreed with the employer's claim that its trade secrets would be jeopardized. If the Secretary does not disagree with the employer's claim, or the judge finds that trade secrets are present, the judge would stay the proceedings to allow the Secretary to obtain a warrant or an order in district court.

the Occupational Safety and Health Act, and a host of other state and federal enactments.

Obtaining a warrant or other order should not be difficult here. Salem did not argue that probable cause did not exist for the original inspection. Indeed it consented to that inspection. As a result of the initial inspection there is "specific evidence of an existing violation," *Marshall* v. *Barlow's Inc.*, 436 U.S. 307, 321 [6 OSHC 1571, 1575] (1978), to establish probable cause for the warrant. *See Hutton* v. *Plum Creek Lumber Co.*, 608 F.2d 1283, 1287 [7 OSHC 1940, 1942-43] (9th Cir. 1979); *In re Establishment Inspection of Marsan Corp.*, 7 BNA OSHC 1557, 1979 CCH OSHD ¶ 23,856 (N.D.Ind. June 21, 1979); *Robert K. Bell Enterprises, Inc.*, 84 OSAHRC __/__, 12 BNA OSHC 1149, 1984-85 CCH OSHD ¶ 27,139 (No. 78-4332, 1984), *aff'd on other grounds*, No. 85-1547 (10th Cir. Feb. 19, 1986). In addition, because the inspection is for a very specific purpose, the warrant can be very limited in scope. *See Rockford Drop Forge Co.* v. *Donovan*, 672 F.2d 626 [10 OSHC 1410] (7th Cir. 1982); *Donovan* v. *Burlington Northern, Inc.*, 521 F. Supp. 99 [10 OSHC 1175] (D.C. Mont. 1981); *In re Establishment Inspection of ASARCO*, 508 F. Supp. 350 [9 OSHC 1317) (N.D.Tex. 1981), *see Sarasota Concrete Co.*, 81 OSAHRC 48/A2, 9 BNA OSHC 1608, 1981 CCH OSHD ¶ 25,360 (No. 78-5264, 1981), *aff'd*, 693 F.2d 1061 [11 OSHC 1001] (11th Cir. 1982).

[2] Accordingly, the March 5, 1984 order permitting entry of the Secretary's expert at Salem's plant is vacated and the case is remanded to the judge. If the judge is notified by the Secretary within 15 days of the date of this decision that he intends to apply for a warrant or an order, the judge is authorized to stay proceedings in the case until the Secretary informs him that the court has ruled on the matter.

The Secretary shall inform the judge within 15 days whether he intends to apply for a search warrant or other judicial order to compel entry into Salem's plant. If the Secretary decides to apply for a warrant or other order, we expect that he and Salem will be able to reach agreement on the provision to be put in the application that will protect Salem's trade secrets, *Cf. Brock* v. *Nabisco Brands, Inc.*, 12 BNA OSHC 1753, 1986 CCH OSHD ¶ 27,549 (W.D.N.Y. Feb. 28, 1986) (guarantee of trade secret confidentiality incorporated in *ex parte* warrant). If no agreement is reached, we suggest that the Secretary provide Salem with 3 working days notice of the time and place that he will apply for the warrant or order, so Salem may have an opportunity to appear and present its concerns about its trade secrets to the court. This will enable the court to include in the warrant or order provisions that protect against unauthorized disclosure of trade secrets. *See Exxon Corp.* v. *Donovan*, 2 Government Disclosure Service (Prentice Hall) ¶ 81,383 at p. 82,023 j(D.D.C. Sept. 28, 1981) (court would not object to signing consent order to restrain disclosure by outside consultants).[9]

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[9]Although the Exxon case arose in the context of a Freedom of Information Act proceeding, it addresses most of the issues that we have wrestled with here. In that case the court declined to enter a declaratory judgment because it would unnecessarily restrict the administrative process. However, the court held that it did have jurisdiction to enter restraining orders prohibiting the government's outside consultants from disclosing information to third parties until after the agency rendered its final administrative decision. Indeed, the court encouraged the parties to submit a consent order "to specifically restrain disclosure by outside consultants" so the plaintiffs would have "the contempt power of the Court as protection for their interests in this matter with respect to disclosure by these consultants."

RECEIVED JUNE 24, 1988

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-1191 September Term, 1987

Graphic Communications International Union, Local 554,

Petitioner

v.

Salem-Gravure, Division of World Color Press, Inc. and Occupational Safety and Health Review Commission,

Respondents

United States Court of Appeals For the District of Columbia Circuit

FILED JUNE 23, 1988

CONSTANCE L. DUPRÉ CLERK

and consolidated case 87-1293

BEFORE: Wald, Chief Judge; Robinson and Danny J. Boggs*, Circuit Judges

ORDER

Upon consideration of the petition for rehearing of Respondent World Color Press Inc. it is

ORDERED, by the Court, that the petition is denied.

FOR THE COURT:

CONSTANCE L. DUPRE, CLERK

BY: ROBERT A. BONNER
Robert A. Bonner
Deputy Clerk

*Of the United States Court of Appeals for the Sixth Circuit, sitting by designation pursuant to 28 U.S.C. § 291(a)

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BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Starr, Silberman, Buckley, Williams, D.H. Ginsburg, Sentelle and Danny J. Boggs*, Circuit Judges

ORDER

The suggestion for rehearing *en banc* of Respondent World Color Press Inc. has been circulated to the full court. No member of the court requested the taking of a vote thereon. Upon consideration of the foregoing it is.

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*Of the United States Court of Appeals for the Sixth Circuit, sitting by designation pursuant to 28 U.S.C. § 291(a)

ORDERED, by the Court, *en banc* that the aforesaid suggestion is denied.

FOR THE COURT:

CONSTANCE L. DUPRE,
CLERK

BY: ROBERT A. BONNER
Robert A. Bonner
Deputy Clerk

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

WORLD COLOR PRESS, INC., *Petitioner,*

v.

ANN McLAUGHLIN, Secretary of Labor, and GRAPHIC COMMUNICATIONS INTERNATIONAL UNION, LOCAL 554, *Respondents.*

CERTIFICATE OF SERVICE

I, Leland W. Hutchinson, a member of the Bar of this Court, hereby certify that on this 21st day of September, 1988, three copies of the Petition for Writ of Certiorari in the above-entitled case were mailed, first class postage prepaid, to the following counsel for respondents:

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I further certify that all parties required to be served have been served.

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